

1 RENE L. VALLADARES  
Federal Public Defender  
2 Nevada State Bar No. 11479  
BRENDA WEKSLER  
3 State Bar No. 8124  
Assistant Federal Public Defender  
4 RYAN NORWOOD  
Assistant Federal Public Defender  
5 411 E. Bonneville, Ste. 250  
Las Vegas, Nevada 89101  
6 (702) 388-6577/Phone  
(702) 388-6261/Fax  
7 Brenda\_Weksler@fd.org  
Ryan\_Norwood@fd.org  
8

9 Attorneys for Ryan W. Payne

10 **UNITED STATES DISTRICT COURT**  
11 **DISTRICT OF NEVADA**  
12

13 UNITED STATES OF AMERICA,  
14 Plaintiff,  
15 v.  
16 CLIVEN BUNDY, ET AL.  
17 Defendants.  
18  
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Case No. 2:16-cr-00046-GMN-PAL-4

**DEFENDANT RYAN PAYNE’S REPLY**  
**TO GOVERNMENT’S RESPONSE TO**  
**MOTION TO DISMISS, WITH**  
**PREJUDICE, DUE TO**  
**GOVERNMENT’S COLLECTION OF**  
**PRIVILEGED ATTORNEY-CLIENT**  
**PHONE CALLS**

(Expedited Treatment Requested)

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21 **Certification:** This Reply is timely filed.

22 Defendant Ryan Payne, through his counsel of record, Assistant Federal Public  
23 Defenders Brenda Weksler and Ryan Norwood, has moved this Court to dismiss the instant  
24 case, with prejudice. This Reply to the Government’s Response is based on the Points and  
25 Authorities set forth below.  
26

1 DATED this 8th day of December, 2017.

2 RENE L. VALLADARES  
3 Federal Public Defender

4 By: /s/ Brenda Weksler  
5 BRENDA WEKSLER  
6 Assistant Federal Public Defender  
7 Attorney for Ryan Payne

8 By: /s/ Ryan Norwood  
9 RYAN NORWOOD  
10 Assistant Federal Public Defender  
11 Attorney for Ryan Payne  
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**MEMORANDUM OF POINTS OF AUTHORITIES**

**I. INTRODUCTION**

The government's Response confirms, rather than alleviates, the concerns raised in Payne's Motion to Dismiss. Based on the representations in that pleading, the prosecution will not or cannot prevent privileged attorney-client calls involving Payne and the other defendants in this case from falling into their hands. The case should be dismissed.

**II. POINTS AND AUTHORTIES**

**A. The government cannot prevent the privileged communications of Payne and the other defendants in this case from being obtained by the prosecution and distributed to other parties**

In October of 2016, Mr. Payne filed a motion informing this Court of his good faith belief that the jail may have been recording his privileged attorney-client conversations with undersigned counsel, and sought remedies to prevent those recordings from falling into the hands of the prosecution. ECF No. 727. The Court denied this motion based on the government's "affirmative[] represent[ation] that **it has no recordings of conversations between Payne and his counsel, or between Payne's co-defendants and their counsel.**" ECF No. 997 at 7 (emphasis added).

On September 11, 2017, however, the government disclosed to Mr. Payne phone calls made from jail by defendant Blaine Cooper, who pled guilty and is cooperating with the government. A number of these recordings capture conversations between Mr. Cooper and the attorney representing him in the related federal criminal case in Oregon, where they discuss matters pertaining to this case. *See* ECF 2893. Exs. F & G (sealed exhibits to supplement, including a summary of the calls identified by Payne and the calls themselves).

In response to Payne's initial communications about these calls, the government represented that "[w]e were advised by the FBI taint team reviewing the calls that although the defendant may be discussing his trial strategy on phone calls none of the calls were between the defendant and his lawyer but rather third parties." Ex. B, ECF 2892. This

1 representation wasn't correct, either. In the Response, the government acknowledges the "FBI  
2 taint team" was indeed aware that the calls received from Blaine Cooper included privileged  
3 calls with his attorney. ECF 2948, pp. 2-3, 8. The government acknowledges that 11 of the  
4 disclosed calls are subject to the attorney-client privilege. One of these calls was from the  
5 Henderson facility, the other were from the Las Vegas jail.

6 Yet the taint team passed along "[a]ll of the calls" to the prosecution, who subsequently  
7 disclosed all of the calls to the co-defendants in discovery. ECF 2948, pg. 3. The government  
8 did not obtain the permission of Cooper or his lawyer. In a recent newspaper interview,  
9 Cooper's lawyer [Krista Shipsey] stated, "I didn't know, nor did Blaine," . . . "It's extremely  
10 concerning. We were assured those conversations would be confidential."<sup>1</sup>

11 The government does not claim that the taint team committed any error in passing along  
12 all of the calls. To the contrary, the government insists it did everything in his power to  
13 safeguard the attorney-client privilege. ECF 2948, pg. 7. The government insists its procedures  
14 are OK because (1) the taint team identified the privileged calls and declined to summarize their  
15 contents, and (2) the prosecutors promise they won't listen to them.

16 These representations do nothing to alleviate the violations of the attorney-client  
17 privilege set forth in Payne's motion. According to the Response, the government "cannot  
18 direct the jail not to record [privileged] calls, or force the jail to review them and weed such  
19 calls out before providing them to the government." ECF 2948, pg. 7. The "taint team" is thus  
20 the *only* mechanism to prevent privileged attorney-client calls from falling into the hands of the  
21 prosecutors, should they elect to request a defendant's jail phone calls. And according to the  
22 government's Response, the taint team *doesn't* screen out privileged calls, but rather passes  
23 them along to the prosecution with a notation on a log that the calls are "minimized." The  
24 defendants, as such, have nothing to protect them from a violation of the attorney-client  
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26 <sup>1</sup> Maxine Bernstein, *Prosecutors shared recorded attorney-client jail phone calls with defense in NV Bunkerville case*, THE OREGONIAN, December 5, 2017, available at [http://www.oregonlive.com/oregon-standoff/2017/12/prosecutors\\_shared\\_recorded\\_at.html](http://www.oregonlive.com/oregon-standoff/2017/12/prosecutors_shared_recorded_at.html)

1 privilege other than the prosecution's say-so that they will not listen to the privileged calls that  
2 will fall into their possession. And even if the prosecution did not listen to his calls, Payne  
3 cannot stop the prosecution from distributing those calls to other, potentially adverse parties, as  
4 they did with Cooper's calls.

5 The government insists Payne has nothing to worry about because "the prosecution team  
6 has obtained none of defendant Payne's *privileged* attorney-client jail calls." ECF 2948, pg. 8  
7 (emphasis added).<sup>2</sup> Neither Payne nor the Court can or should accept this representation. For  
8 one thing, the government has already twice represented to the Court that they were not in the  
9 possession of other co-defendants' privileged calls, when they were in fact in the possession of  
10 (at least) Blaine Cooper's privileged calls. Notably, the government refuses to clarify *when* it  
11 came into the possession of these calls, although they obviously had them in their possession  
12 on November 13, 2017, when the prosecution nonetheless incorrectly claimed that "none of the  
13 calls" reviewed by the taint team were privileged. Ex. B to ECF 2892.

14 The government, moreover, does not deny that it has requested Payne's recorded jail  
15 phone calls (or those of other co-defendants), as it commonly does with respect to incarcerated  
16 defendants who are going to trial. As noted above, the government claims to be powerless to  
17 stop the jail from recording Payne's privileged calls, or to request the jails to "weed" them out  
18 when requesting calls. And it is clear from the calls received from Blaine Cooper that the jails,  
19 including the Henderson facility at which Payne was incarcerated for over a month until the  
20 Court released him on house arrest release last week, do in fact record and pass along privileged  
21 calls. Pursuant to the procedure described by the government with respect to Cooper's calls,  
22 the "taint team" reviewing such calls might note such calls are privileged, but will still pass  
23 them along to the government. Unless the government were prevented from obtaining his calls  
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26 <sup>2</sup> The government's Response only appears to deny that the prosecution does not possess  
Payne's privileged communications, leaving open the possibility they possess other defendants'  
privileged communications, including potentially the other three defendants in this trial.

1 – as Payne sought to do in his original October 2016 Motion -- Payne has nothing to protect  
2 him from an inevitable violation of his attorney-client privilege.

3 Even if the taint team's practice of merely identifying, rather than screening out,  
4 privileged communications were somehow an adequate safeguard against a Sixth Amendment  
5 violation, the information provided by the government shows the taint team wasn't doing that  
6 job adequately. Payne had located, reviewed, and specifically identified for the government 12  
7 calls made from the Las Vegas jail to Cooper's Oregon attorney at her office phone number.  
8 Ex. B to ECF 2892; ECF 2893, Exs. F & G. In its Response, the government provided under  
9 seal several spreadsheets (without providing any authentication, authorship, or date date) that  
10 purport to be from the taint team that screened and summarized Cooper's calls. These sheets,  
11 however, only list *nine* of these identified calls. ECF 2948, pg. 8.<sup>3</sup> The spreadsheets are  
12 missing three of the jail calls from Cooper to his attorney identified by the Payne, which  
13 nonetheless were passed along to the prosecution and then provided in discovery without  
14 anything marking them as privileged communications.

15 The information provided by the government also raises issues about the procedures and  
16 purported independence of the "taint team." In at least one instance, the team "minimized" a  
17 call made to a party who was not Cooper's lawyer, but in which the conversation concerned  
18 his legal representation. Ex. C, #24. The government's response lists this call as a "privileged"  
19 communication. ECF 2948, pg. 8. *See also United States v. Richey*, 632 F.3d 559, 566 (9th  
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22 <sup>3</sup> The twelve calls from the spreadsheets listed in the Response (ECF 2948, pg. 8) are  
23 not the same 12 calls identified by Payne. They include nine of the Las Vegas jail calls to the  
24 lawyer, but also include (a) a privileged call made from the Henderson facility to Cooper's  
25 lawyer (Ex. B, #89); (b) a call made to another party that discusses a conversation with the  
26 lawyer, which the taint team marked as "minimized," and which the government acknowledges  
to be privileged, (Ex. C, #24); and (c) a call made to a third party where Cooper discusses his  
conversations with his attorney, which the spreadsheet lists as a call to the attorney, but which  
is summarized and which the government maintains is not a privileged call. (Ex. A, #95).

The three calls identified by the defense that are not listed in the spreadsheet are further  
described in a sealed supplement to this Motion.

1 Cir. 2011) (“The attorney client privilege may extend to communications with third parties who  
 2 have been engaged to assist the attorney in providing legal advice.”). Cooper’s calls, however,  
 3 include numerous other third-party communications where he discusses his cases in Oregon  
 4 and Nevada, his communications with his lawyer, and his legal strategies. *See* Exs. A, B, and  
 5 C to ECF 2948 (summarizing these calls). The taint team did not minimize these conversations,  
 6 and indeed summarized many of them in detail for the benefit of the prosecution. The Response  
 7 says nothing about how the taint team draws these distinctions. In particular, the government  
 8 does not disclose whether the “FBI taint team” includes a lawyer who is competent to resolve  
 9 the legal questions that third-party communications may raise regarding the attorney-client  
 10 privilege. Nor it is clear why a taint team that is “separate and apart” from the prosecution  
 11 needs to provide summaries of Cooper’s non-privileged calls for the benefit of the prosecution.

12 **B. Dismissal is necessary to remedy the Sixth Amendment Violations**  
 13 **alleged by Payne and confirmed by the government’s response.**

14 “The attorney-client privilege is not only the oldest privilege known to the common law,  
 15 but the attorney-client privilege is also, perhaps, the most sacred of all legally recognized  
 16 privileges, and its preservation is essential to the just and orderly operation of our legal system.”  
 17 *In re Grand Jury Proceedings Grand Jury No. 97-11-8*, 162 F.3d 554, 556 (9th Cir. 1998). The  
 18 privilege is particularly important for criminal defendants: “In American criminal law, the right  
 19 to privately confer with counsel is nearly sacrosanct.” *Nordstrom v. Ryan*, 762 F.3d 903 at 910  
 20 (9th Cir. 2014). Indeed, it “is well established that an accused does not enjoy the effective aid  
 21 of counsel if he is denied the right of private consultation with him.” *Id.* (internal quotation  
 22 marks omitted); *see also Bittaker v. Woodford*, 331 F.3d 715, 723 n.7 (9th Cir. 2003) (en banc)  
 23 (“Utmost candor between an attorney and client is essential to effective assistance of counsel.”  
 24 (brackets and internal quotation marks omitted)).

25 A defendant cannot enjoy his right to private consultation with his attorney when he  
 26 knows his privileged communications will end up on his prosecutor’s desk. That’s exactly what

1 is happening here. According to their own representations in this case, the government cannot  
2 (or will not) prevent the jails from recording the defendants' calls with their attorneys. The  
3 government cannot (or will not) require the jails to screen or edit those calls before sending  
4 them to the government. The government's taint team cannot (or will not) identify all of the  
5 privileged calls it receives. But even if the taint team could identify such calls, it does no good  
6 because they will send them all along to the prosecution anyway.

7       The prosecution's possession of a defendants' confidential communications violates the  
8 Sixth Amendment, regardless of whether the prosecutors claim they will not listen to them.  
9 Defendants "have to be able to talk to their lawyers candidly *without fear that what they say to*  
10 *their own lawyers will be transmitted to the government.*" *United States v. Chen*, 99 F.3d 1495,  
11 1499 (9th Cir. 1996) (emphasis added). In this case, the government has already proven itself  
12 to be an untrustworthy guardian of Cooper's confidential communications. The government  
13 not only possessed these communications, but sent them along to other co-defendants who are  
14 in an adverse position to Cooper. If this is how the government treats the privileged  
15 communications of a defendant who is *cooperating* with them, how can Payne expect the  
16 government to treat his privileged communications any better?

17       The government's naked assertion that it does not have Payne's privileged phone calls  
18 in its possession is of no value for several reasons. The government possessed Cooper's  
19 privileged communications despite two prior representations that it did not have attorney-client  
20 calls. And despite Payne's request in his Motion, the government refuses to state whether it  
21 has sought or possesses Payne's phone calls, or the phone calls of other co-defendants. Payne  
22 has every reason to believe that the government has requested his calls. As explained above,  
23 the government's lack of safeguards ensures that requesting a defendants' jail phone calls will  
24 inevitably cause the prosecution to receive his *privileged* jail phone calls. In any event, Payne  
25 doesn't know what the government considers to be "privileged" communications. The  
26 discrepancies in the "taint team" spreadsheets, noted above, show that the taint team is either



1 unable to correctly identify privileged calls, and/or that it applies an unduly narrow standard to  
2 identify such calls.

3         The government's actions have already substantially prejudiced the defense. The  
4 flagrant violation of Cooper's Sixth Amendment rights have chilled the free exchange of  
5 communications between Payne and his counsel. *See Nordstrom*, 782 F.3d at 910 ("It takes no  
6 stretch of imagination to see how an inmate would be reluctant to confide in his lawyer about  
7 the facts of the crime, perhaps other crimes, possible plea bargains, and the intimate details of  
8 his own life and his family members' lives, if he knows that a guard is going to be privy to  
9 them, too."); *Weatherford v. Bursey*, 429 U.S. 545, 554 n.4 (1977) ("One threat to the effective  
10 assistance of counsel posed by government interception of attorney-client communications lies  
11 in the inhibition of free exchanges between defendant and counsel because of the fear of being  
12 overheard.").

13         The cases the government relies upon to show lack of prejudice are inapposite. In most  
14 of the case, the inference with the privilege was non-prejudicial because privileged  
15 communications did *not* end up in the prosecution's possession. *See United States v.*  
16 *Hernandez*, 937 F.2d 1490, 1493 (9th Cir. 1991) (noting co-defendant turned cooperator did  
17 not disclose to government information learned at joint defense meeting); *United States v.*  
18 *Morrison*, 449 U.S. 361 (1981) (concerning government agents who sought to interfere with  
19 attorney-client relationship, but who were not alleged to have obtained any privileged  
20 communications); *Weathersby v. Bursey*, 429 U.S. 545, 548 (1977) (undercover agent attended  
21 privileged meetings, but did not "discuss" or "pass on" details to his superiors or prosecuting  
22 attorney). *United States v. Green*, 962 F.2d 938 (9th Cir. 1992), doesn't involve a privileged  
23 communication at all, but a rather a recording of a conversation between a law clerk working  
24 for the defendant's attorney and a third party. *Id.* at 941. None of these cases are remotely  
25 comparable to this case, where at the very least: (1) the government has intercepted numerous  
26 privileged communications between a co-defendant and his attorney where they discuss  
intimate details about his cases; (2) those communications have been sent to the prosecutors,

1 and (3) the communications were then sent along to co-defendants who could and would seek  
2 to use them against Cooper should he be called to testify against them. *See* Sealed Supplement  
3 (discussing exculpatory information in the privileged calls).

4 The government's flagrant misconduct merits dismissal of the indictment as a Sixth  
5 Amendment violation, as well as due process violation and an exercise of the Court's  
6 supervisory powers under *United States v. Chapman*, 524 F.3d 1073, 1084 (9th Cir. 2008), as  
7 set forth in Payne's original Motion. But even if the Court does not agree that existing record  
8 justifies dismissal, it must conduct further inquiry to determine if the government has violated  
9 the Sixth Amendment by collecting the privileged calls of other defendants in this case.

10 First, the Court should require the government to affirmatively state and demonstrate  
11 whether or not it has sought and obtained the jail phone calls of Payne and the other defendants  
12 in this case.

13 If the government can demonstrate that it has not already sought jail calls, the  
14 government should be barred from obtaining them. As explained above, the government lacks  
15 adequate safeguards to prevent privileged jail phone calls from arriving in the prosecution's  
16 office if phone calls are requested. As such, the only way to prevent a Sixth Amendment  
17 violation is to prevent the prosecution from obtaining any calls in the first place.

18 If the government has obtained any calls from Payne or other co-defendants, those calls  
19 must be reviewed in camera to determine if they include privileged calls. The government's  
20 naked representations that it does not possess Payne's privileged phone calls cannot be taken  
21 on faith in light of their prior representations about Cooper's calls, and in light of the  
22 demonstrable lack of safeguards described *supra*. Because any privileged calls may concern  
23 this ongoing trial, Payne requests that such in camera review be conducted by a different judge.

24 *If in camera* review does reveal the prosecution possesses other privileged attorney-  
25 client calls (in spite of their numerous prior representations), the indictment should certainly be  
26 dismissed.

1     **III.     CONCLUSION**

2             For the reasons described above and in his Motion, Mr. Payne asks the indictment to be  
3 dismissed, or alternately for further inquiry as described *supra* and at ECF 2842, pp. 10-11.

4             DATED this 8th day of December, 2017.

5                             Respectfully submitted,  
6                             RENE L. VALLADARES  
7                             Federal Public Defender

8                             By: /s/ Brenda Weksler

9                             BRENDA WEKSLER  
10                            Assistant Federal Public Defender  
11                            Attorney for Ryan Payne

12                            By: /s/ Ryan Norwood

13                            RYAN NORWOOD  
14                            Assistant Federal Public Defender  
15                            Attorney for Ryan Payne  
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**CERTIFICATE OF ELECTRONIC SERVICE**

The undersigned hereby certifies that she is an employee of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on December 8, 2017, she served an electronic copy of the above and foregoing **DEFENDANT RYAN PAYNE'S REPLY TO GOVERNMENT'S RESPONSE TO MOTION TO DISMISS, WITH PREJUDICE, DUE TO GOVERNMENT'S COLLECTION OF PRIVILEGED ATTORNEY-CLIENT PHONE CALLS (Expedited Treatment Requested)** by electronic service (ECF) to the person named below:

STEVEN W. MYHRE  
Acting United States Attorney  
NADIA JANJUA AHMEN  
Assistant United States Attorney  
DAN SCHIESS  
Assistant United States Attorney  
501 Las Vegas Blvd. South  
Suite 1100  
Las Vegas, NV 89101

/s/ Lauren Conklin  
Employee of the Federal Public Defender